NO. 85-1476

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1985

FRANK BLACKBURN, WARDEN
LOUISIANA STATE PENITENTIARY,
Petitioner

versus

JAMES FLOWERS,
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI

JOHN MAMOULIDES
DISTRICT ATTORNEY
24th JUDICIAL DISTRICT
PARISH OF JEFFERSON
STATE OF LOUISIANA

DOROTHY A. PENDERGAST
WILLIAM C. CREDO, III
ASSISTANT DISTRICT ATTORNEYS
RESEARCH & APPEALS
OFFICE OF THE
DISTRICT ATTORNEY
NEW COURTHOUSE ANNEX
GRETNA, LOUISIANA 70053
TELEPHONE:(504) 368-1020

50 pp

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

QUESTIONS PRESENTED

1. In a capital case, must the decision that a defendant possesses the requisite degree of Enmund culpability be made at the guilt-innocence or sentencing phase of the trial.

2. If allowed to stand, would the decision in this case perpetuate the conflict between the Fifth Circuit and Eleventh Circuit Court of Appeals recently resolved by this Honorable Court in Cabana v. Bullock, ____ U.S. ____, (No. 84-1236, decided on January 22, 1986).

PARTIES TO THE PROCEEDING BELOW

All parties appear in the caption of the case in the United States Supreme Court.

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NO:

IN THE

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O' :OBER TERM, 1985

FRANK BLACKBURN, WARDEN
LOUISIANA STATE PENITENTIARY,
PETITIONER
versus

JAMES FLOWERS,
RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

PETITION FOR CERTIORARI

MAY IT PLEASE THE COURT:

The petition of the State of Louisiana respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals For the Fifth Circuit entered in these proceedings on January 8, 1986.

OPINION BELOW

The unpublished as of yet opinion of the United States Court of Appeals for the Fifth Circuit is printed in Appendix "A" below.

The granting of a certificate of probable cause and docketing of appeal is reported as Flowers v. Blackburn, 764 F.2d 276 (CA5, 1985).

The remand for further review is reported as Flowers v. Blackburn, 759 F.2d 1195 (CA5 1985).

The granting of a stay of execution and remand is reported as Flowers v. Blackburn, 759 F.2d 1194 (CA5, 1985).

The denial of habeas relief and exhaustion of state remedies is reported as State ex rel. Flowers v. Maggio, 466 So.2d 1293 (La. 1985).

The direct state appeal is reported as State v. Flowers, 441 So.2d 707 (La. 1983).

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on January 8, 1986. See Appendix "A".

On January 30, 1986, pursuant to motion by petitioners, an order was entered by the United States Court of Appeals for the Fifth Circuit staying the mandate of the above-cited judgment pending a timely application for certiorari to this Honorable Court by March 1, 1986. A copy of that order is attached as Appendix "B".

Thus, this petition is timely filed as of March 1, 1986, within sixty (60) days of the judgment below and jurisdiction is established pursuant to 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Eighth Amendment forbids the imposition of the death penalty on "one who aid and abets a felony in the course of which a murder is committed by others but who does not himself kill, attempt to kill, or intend that a killing take place or that lethal force will be employed. See Enmund v. Florida, 458 U.S. 782, 797 (1982).

STATEMENT OF THE CASE

(Taken from 441 So.2d 707 (La. 1983 at 710-711)

On October 30, 1981, Petitioner-appellant, James Flowers, and Olin Grant ("Poppa") were indicted for the first degree murder of seventy year old Madeline Malmstrom (LSA-R.S. 14:30). The two defendants were severed for trial; Petitioner's trial was held February 2-5, 1982. Several motions were heard immediately before Petitioner's trial: the trial judge denied motions to suppress various evidence and a motion to suppress a statement given by Petitioner. At the conclusion of trial Petitioner was found guilty as charged. Petitioner was subsequently sentenced to death based on the jury's finding of five aggravating circumstances (La.C.Cr.P. arts. 905.3 905.4). A motion for new trial was denied at later proceedings. Petitioner's conviction and sentence were affirmed on appeal. State v. Flowers, 441 So.2d 707 (La. 1983).

Petitioner was represented through both phases of the murder trial by appointed counsel, Wiley Beevers, Esq.

In June of 1984 Petitioner instituted post conviction proceedings (La.C.Cr.P. arts. 924-930.7) in the state courts raising several grounds for relief. A hearing was held on August 31, 1984; evidence was presented on the effectiveness of counsel issue. At the conclusion of the hearing the judge denied the petition and announced his reasons for doing so into the record. Relief was subsequently denied in the Louisiana Supreme Court. State ex rel Flowers v. Maggio, 466 So.2d 1293 (La. 1985).

Relief was denied Petitioner in the United States District Court for the Eastern District of Louisiana on May 1, 1985 (relief had twice before been denied but the Appeals Court remanded the case each time). The United States Court of Appeals granted Petitioner's certificate of probable cause on June 18, 1985. Flowers v. Blackburn, 764 F.2d 276 (5th Cir. 1985).

On January 8, 1986, an opinion was rendered by a three judge panel of the Fifth Circuit reversing the denial of habeas relief by the United States District Court. See Flowers v. Blackburn, ____ F.2d ____ (CA5 1986); Appendix "A".

STATEMENT OF FACTS

A seventy year old widow who lived alone was brutally murdered in her home at 1500 Jefferson Street in Gretna on October 23, 1981. The physical evidence indicated that she had been severely beaten, strangled and raped during a burglary. The assailant had broken in a window and ransacked the house. Whether any of her property had been taken could not be determined immediately, however.

The next day an anonymous tipster telephoned the Gretna Police Department and furnished information linking the defendant, James Flowers, with the murder. The unidentified caller asked for the police radio dispatcher by name but was told that he was on another call. Whereupon, the informant remarked that he didn't have time to wait and gave his information to another officer. According to the officer, the tip was to the effect that James Flowers, a black male, could be found in the area of Jefferson and Hamilton Streets driving a small white Chevette-type car containing one black male

passenger and something taken from "that lady that was murdered on Jefferson Street yesterday". This message was given to the dispatcher who relayed it by radio to Officer Glen Michel, on patrol in the Jefferson Street area.

Officer Michel testified that he was advised by police radio to go to the 1500 block of Jefferson Street to look for a small white vehicle, possibly a Chevette or Mercury, driven by a Negro male by the name of James Flowers, who was suspected of having evidence taken during a burglary-murder which occurred the previous day at 1500 Jefferson. At this time, Michel was driving along Madison Street, parallel with Jefferson Street, one block from the murder scene. He was approaching the intersection of Madison and Cook Streets, and was about one third of a block from the corner. Ten seconds later a black male driving a Mercury came off Jefferson Street, turned on Cook Street, then turned onto Madison Street ahead of Michel and came to a stop in the next block in which Madison comes to a dead end. Michel pulled through the intersection and up behind the vehicle,

activated his red bar light, walked up to the white Mercury and asked the driver for his operator's license. Upon looking in the window, however, the officer saw some hand rolled marijuana cigarettes in an ashtray by the driver's right leg. He asked the occupant to exit the vehicle and seized the cigarettes, along with four or five "dime bags" of marijuana and some costume jewelry on the floor. The officer ran a computer check on the defendant's driver's license and verified that he was James Flowers.

Although the record does not reflect that Flowers was formally advised that he was under arrest at the scene, it is clear that he effectively was arrested and taken into custody when the officer saw the marijuana and asked him to get out of the car. Following his arrest, Flowers was escorted to the Gretna Police Complex and searched by Officer Michel. The officer discovered a knife and charged the defendant, a convicted felon, with possession of a concealed weapon in violation of La.R.S. 14:95.1. The defendant and all of the seized items were

then delivered to Detective Dunn, the officer in charge of the murder investigation.

Detective Dunn showed the jewelry seized by Officer Michel and a necklace which Dunn removed from around the defendant's neck to members of the victim's family. The jewelry was positively identified as property of the victim. The defendant was informed that he was under investigation for aggravated burglary and first degree murder and verbally advised of his constitutional rights. The defendant waived his rights and gave a verbal statement in which he implicated himself in the burglary but contended that a confederate had entered the house and committed the murder.

Approximately five hours later, the defendant was placed under arrest for aggravated burglary, first degree murder and receiving stolen property and was again advised of his rights. Flowers, a twenty year old with an eleventh grade education, then signed a standardized wavier-of-rights form and was interrogated by Detective Dunn. The detective typed out his questions and the defendant responses thereto. Flowers stated that he

never entered the victim's home and that his participation in the crime was limited to helping the sixteen year old co-defendant gain entrance into the home. The victim's screams caused the two defendant's to seek shelter along a nearby railroad track, where approximately eighty dollars was divided. Flowers told Detective Dunn that he and his confederate then parted company with Flowers returning to his home as the co-defendant returned to the victim's house. Within thirty minutes the two were reunited along the railroad tracks and at this point, according to Flowers' statement, the jewelry which Office Michel seized was given to Flowers for safe-keeping.

LAW AND ARGUMENT

1. A Finding of Enmund Culpability

Before the Court is a request for the reinstatement of a death penalty vacated by the United States Court of Appeals for the Fifth Circuit.

This request is premised on the appropriate fact finding done with respect to Enmund culpability, both on direct appeal and at a state evidentiary hearing on habeas relief and on the clearly inappropriate, if not inconsistent, factual and legal opinion rendered by the Court of Appeals for the Fifth Circuit.

It is first most significant to note that the present case presents an identical situation recently ruled on by this Court in Cabana v. Bullock, ____ U.S. ____ (No. 84-1236, decided on January 22, 1986).

Therein, it was held that the Enmund rule need not be enforced by the jury (during trial) and does not impose any particular form of procedure upon the States. It further held that a reviewing court must examine the entire course of the state proceedings in order to

determine whether, at some point, the requisite factual finding as to the defendant's Enmund culpability has been made. Furthermore, such an inquiry cannot be limited to an examination of jury instructions. Finally, if such a finding has been made, it must be presumed correct by virtue of 28 U.S.C. 2254 (d) and unless the habeas petitioner can bear the burden of overcoming the presumption, the court must hold that the Eighth Amendment as interpreted in Enmund is not offended by the death sentence.

Both the Cabana case and the instant case are identical in every key way.

Both involve the death penalty, both involve two potentially culpable defendants, both appear in the Federal Fifth Circuit on habeas after prior rejection by the state courts and United States District Court. Both are decided by three judge panels (no judges overlap). Both are decided solely by a review of jury instructions. Both death penalties are reversed by the Fifth Circuit Court of Appeals. In Cabana, a remand is solely for a new

sentence hearing. In the instant case, remand is for a new trial.

In accordance with the mandates of Cabana, it is respectfully submitted that the proper factual finding regarding Enmund culpability was found by the Louisiana Supreme Court.

In affirming the conviction and death sentence of the defendant, the Louisiana Supreme Court discussed the aggravating factors found by the jury and the support in the record for such findings. As fact, the Louisiana Supreme Court found that **James Flowers** has committed an aggravated rape of the victim, that **James Flowers** unauthorizedly entered the victim's home with the intent to commit a theft and that **James Flowers** committed the offense in an especially heinous atrocious or cruel manner. Stating it further:

> "Madeline Malmstrom, the seventy year old victim, was severely beaten about the head and face, strangled and raped. Patterned abrasions and bruises on her neck were later matched up to the patterns in the soles of the defendant's tennis shoes. The victim's jaw was broken, several

> teeth were knocked loose, and she suffered at least three broken ribs. Serious physical abuse of the victim before death, such as that which this victim suffered constitutes torture. The jury's finding that the homicide was committed is an especially heinous, atrocious cruel manner is supported by the evidence."

See State v. Flowers, 441 So.2d 707 (La. 1983) at 718.

To go even further, at the state evidentiary hearing, pursuant to questions on direct examination by habeas Petitioner's counsel, Wiley Beavers, appointed trial counsel, clearly stated that the defendant admitted kicking the lady in the throat and choking her with a belt, in essence, his personal guilt. (State Evidentiary Transcript, pp. 114, 132) Appendix "C".

Thus, although focusing on the issues of jury instructions and issues of jury instructions and ineffective assistance of counsel, the trial court in state habeas clearly found Enmund culpability. (St. Evid. Tr. p. 272) Appendix "C".

Thus, as Cabana goes so must Flowers. This Honorable Court must act to correct the incorrect

application of law, procedure and fact finding by the Fifth Circuit. Otherwise, a legitimate death penalty conviction will be lost and even greater frustration and inconsistency will be added to the maze of death penalty litigation.

2. Resolution Of Conflicts Between The Fifth Circuit And Eleventh Circuit Has Been Done In Cabana And Must Be Carried Out In This Case

Because of the Fifth Circuit's holding that Enmund can be satisfied only by findings made at the guilt-innocence or sentencing phase of a trial (see Bullock v. Lucas, 743 F.2d 244 (CA5, 1984) and Reddix v. Thigpen, 728 F.2d 705 (CA5, 1984)) and its conflict with the interpretation of Enmund by the Eleventh Circuit (see Ross v. Kemp, 756 F.2d 1483 (CA11, 1985), this Honorable Court granted certiorari, heard arguments and rendered a decision in Cabana v. Bullock, id.

In resolving the conflict, this Court completely rejected the reasoning and decision rendered by the Fifth Circuit.

This identical reasoning and review process in the instant case, while consistent with internal Fifth Circuit thinking, is completely wrong and must be rejected in a similar fashion.

Many commentators have pointed out that this Court does not simply sit to correct errors, resolve disputed issues or hear the ordinary run of litigation. This Court is first and foremost a constitutional court.

As the impartial administration of justice is the foundation of liberty as embodied in our Constitution, this Court must act to insure that nearly identical cases with nearly identical issues are decided in the same fashion. To do otherwise brings a Constitution with no meaning.

CONCLUSION

This Honorable Court must grant certiorari in this instant case to maintain uniformity in its decisions and enforce its constitutional interpretation as established in Cabana, id.

As the identical reasoning and review process used by the Fifth Circuit in Cabana was rejected by this Honorable Court and used identically again in this case, a writ of certiorari must be issued so that this matter can be resolved by further appellate review of the other issues raised not inconsistent with this Court's judgment in Cabana.

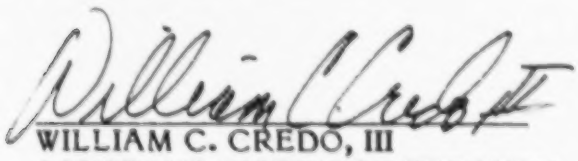
In addition, a dual remand is possible. First, this Court could issue a writ of certiorari to the Fifth Circuit to proceed with the other appellate issues in light of Cabana. Second, if not satisfied with the record excerpts provided, this Court could also issue a remand to the State District Court to clarify its Enmund ruling, said clarification to be forwarded directly to the Court of Appeals for the Fifth Circuit.

In either event, certiorari must be exercised if both the State and defendant are to be treated equally under law.

Respectfully Submitted,

JOHN M. MAMOULIDES
DISTRICT ATTORNEY
24TH JUDICIAL DISTRICT
PARISH OF JEFFERSON
STATE OF LOUISIANA

DOROTHY A. PENDERGAST
ASSISTANT DISTRICT ATTORNEY
RESEARCH & APPEALS
OFFICE OF THE
DISTRICT ATTORNEY



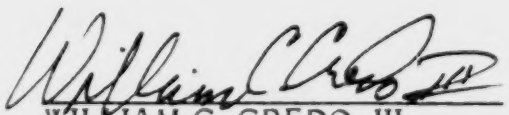
WILLIAM C. CREDO, III
ASSISTANT DISTRICT ATTORNEY
RESEARCH & APPEALS
OFFICE OF THE
DISTRICT ATTORNEY
NEW COURTHOUSE ANNEX
GRETNA, LOUISIANA 70053
TELEPHONE: (504) 368-1020

VERIFICATION

I, **William C. Credo, III,** a member of the Bar of the Supreme Court of the United States and the attorney of record for Respondent in the above entitled matter.

I have read the foregoing petition and know the contents thereof.

I declare under penalty of perjury under the laws of the State of Louisiana that the foregoing is true and correct. Executed on February 28, 1986 at Gretna, Louisiana.

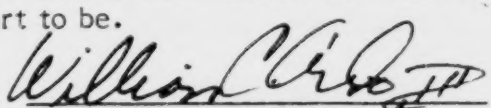


WILLIAM C. CREDO, III
ASSISTANT DISTRICT ATTORNEY

APPENDIX

Appendix "A"	Flowers v. Blackburn, ____ F.2d ____ (CA5 1986); Filed January 8, 1986
Appendix "B"	Stay Order Of Mandate
Appendix "C"	Transcript State Evidentiary Hearing August 31, 1984 Pages 113, 114, 132 And 272

I certify that all of the appendices attached to the petition for Certiorari filed herein are true copies of what they purport to be.



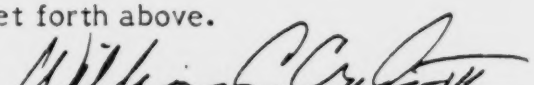
WILLIAM C. CREDO, III

STATEMENT OF MAILING

I, WILLIAM C. CREDO, III, hereby certify that, on the 28th day of February, 1986, I served copies of the of the foregoing Petition by personally placing same in a sealed envelope first class postage thereon fully prepaid in United States Post Office mail box in Gretna, Louisiana on each of the parties thereto, as follows:

1. To the United States Supreme Court, Office of the Clerk, Washington, D.C. 20543 enclosing established filing fee; and
2. On Petitioner, James Flowers, through his counsel of record, Michele Gaudin, 614 Tchoupitoulas Street, New Orleans, Louisiana 70130.

IT IS FURTHER certified that all parties required to be served have been served, and that the list of such parties is as set forth above.



WILLIAM C. CREDO, III

PARISH OF JEFFERSON

STATE OF LOUISIANA

On February 28, 1986, before me the undersigned, a Notary Public in and for said state, personally appeared William C. Credo, III, known to me to be the person whose name is subscribed to the within instrument and acknowledged that he executed the same.

WITNESS my hand and official seal.

Marion F. Edwards
Notary Public for said County
and State

APPENDIX "A"

Flowers v. Blackburn, ____ F.2d ____ (CA5 1986);
Filed January 8, 1986

Consisting Of Pages A-1 Thru A-17

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

AMES FLOWERS,
Petitioner-Appellant,

v.

FRANK BLACKBURN, Warden,
Louisiana State Penitentiary, Angola,
Respondent-Appellee.

No. 85-3315

OPINION

Filed January 8, 1986

Before: Thomas Gibbs Gee, Alvin B. Rubin and Carolyn Dineen Randall, Circuit Judges.

Opinion by Judge Carolyn Dineen Randall

Appeal from the United States District Court
for the Eastern District of Louisiana
Patrick E. Carr, District Judge, Presiding

SUMMARY

Criminal Procedure

Appeal from the dismissal of a petition for a writ of habeas corpus under 28 U.S.C. §§ 2241 and 2254. Reversed and remanded.

A 70-year-old woman was raped and killed in her house by at least one intruder who had gained access through a broken window and ransacked the house, apparently in search of valuables. The appellant was arrested and found to be in possession of jewelry having belonged to the victim. He admitted taking part in the burglary, but claimed that a confederate had entered the house alone and killed the victim, and that his participation had been limited to helping the other gain entry to the house. Appellant was tried alone for first-degree murder, convicted, and given a death sentence. The

conviction was affirmed by the Louisiana Supreme Court and habeas corpus petition was filed in federal district court. The petition was summarily denied without service or an answer by the state under Rule 4 of the Rules Governing section 2254 cases in the United States District Courts. This Court remanded the case to the district court with instructions that a statement of reasons be provided for denial of each of the claims presented by the appeal. The district court again dismissed the petition as without merit under Rule 4, concluding on the issue of jury instructions that no reasonable juror could have misconstrued the instructions given in such way as to convict the defendant without a finding that he had the requisite intent to kill. This Court again remanded the case to the district court with instructions to obtain the trial record and review the claims in light of that record. The district court ordered the petition dismissed under Rule 4 a third time without requiring an answer by the state. The appellant brought this appeal, to which the state filed a brief in opposition.

[1] To determine if jury instructions violate the Fourteenth Amendment's requirement that the state prove every element of a criminal offense beyond a reasonable doubt the court must determine whether based on the specific language of the instruction the challenged instruction creates a constitutionally objectionable "mandatory presumption" or "merely a permissive inference" (1) as an essential element of the crime; and (2) if a specific portion of the jury charge, considered in isolation, could reasonably have been understood as creating a presumption, then the potential offending words must be considered in the context of the charge to the jury as a whole.

[2] Mandatory presumptions instruct the jury that it must infer the presumed fact if the state proves certain predicate facts. They violate the due process clause if they relieve the state of the burden of persuasion on an element of the offense. [3] Under Louisiana law the crime of first-degree murder under accomplice liability includes the element that the defendant have the specific intent to kill. The jury instruction in this case that all participants in a crime "are principals, and equal offenders, and subject to the same punishment," plainly relieved the state of the burden of proof on the critical question of state of mind. In effect, the charge permitted the state to secure a conviction by showing that either the appellant

the confederate had the requisite specific intent to kill. [5] A reasonable juror could have concluded that the state needed to show only that either participant killed the victim with the requisite specific intent, and therefore, standing alone, the challenged instruction relieved the state of its affirmative burden of persuasion on one crucial element of the crime charged.

[6] Although the instructions as a whole required that the jury find that the killing was intentional, their flaw was that they did not specify who must possess the requisite intent in order to find the appellant guilty. [7] Although the instructions did state in several places that the jury must find that "the defendant" acted with specific intent, the unequivocal language of the flawed aspect of the instruction could have led a reasonable juror to conclude that his job was over when he determined that someone had killed the victim with specific intent. [8] The charge read as a whole does not alleviate the error, and therefore the jury charge violated the appellant's right to due process.

[9] The order of the district court must be reversed and the case remanded with instructions to grant the petition unless the state provides a new trial commencing within 120 days.

OPINION

CAROLYN DINEEN RANDALL, Circuit Judge:

James Flowers was convicted in 1982 of first-degree murder in connection with the brutal rape and slaying of a 70-year old woman. The jury imposed the death penalty. He appeals from the dismissal of his petition for a writ of habeas corpus, 28 U.S.C. §§ 2241, 2254. Because the jury instructions at the guilt/innocence phase of the trial could have improperly allowed the jury to find Flowers guilty of first-degree murder without finding that he had a specific intent to kill, as required by state law, we reverse.

I.

A seventy-year old woman, Madeline Malmstrom, was raped and killed in her house in Gretna, Louisiana by at least one intruder on

October 23, 1981. The assailant or assailants had gained acces through a broken window and ransacked the house, apparently i search of valuables. On October 24, police received a tip that Jame Flowers was in a particular neighborhood in Gretna in a sma white car, and that he had objects stolen from "that lady that wa murdered on Jefferson Street yesterday." An officer on patrol in th neighborhood spotted a car matching the description, and pulled over. He asked the driver for his license. The license indicated tha the driver was named James Flowers. Upon looking in the window the officer saw several marijuana cigarettes in the ashtray, and ordered the driver from the car. The officer seized about four bag of marijuana and several items of costume jewelry. Flowers wa arrested on narcotics charges, and taken to police headquarters where a search of Flowers yielded a knife. Thereupon, he wa charged with possession of a concealed weapon by a convicte felon.

Relatives of the victim identified the jewelry seized in the car a having belonged to the victim. Upon being informed that he wa under investigation for first-degree murder and aggravated bur glary, Flowers made a statement admitting that he had taken par in the burglary, but claiming that a sixteen-year old confederate Olin Grant, had entered the house alone and had killed the victim. After being formally arrested on first-degree murder charges a shor while later, Flowers made another statement, asserting that his par ticipation in the crime had been limited to helping Grant gain entry to the house.

The trial against Flowers alone[1] commenced on February 2 1982. The State introduced certain evidence that could be inter preted to link Flowers with the slaying. First, Flowers' blood type type O, was the same as the blood type of the individual who raped the woman. Second, blood stains on the victim's neck carried the imprint of a sneaker or tennis shoe that an expert witness said wa similar to that worn by Flowers on the day he was arrested. Third the coroner testified that the victim might have been strangled with

[1]Grant was also arrested and charged with first-degree murder, and at hi request his trial was severed from Flowers'. Counsel represents that Grant plea guilty to manslaughter in connection with the slaying, apparently after Flowers trial, and was sentenced to 21 years incarceration.

a belt similar to that worn by Flowers. The prosecution introduced as evidence Flowers' post-arrest statement regarding his involvement in the crime. Grant did not testify against Flowers, nor did the State introduce evidence of what kind of shoes and belt Grant wore when he was arrested. The evidence indicated that Grant also has type O blood.

The trial judge instructed the jury on the elements of first-degree murder, second-degree murder, and voluntary manslaughter. The judge stated that to find Flowers guilty of first-degree murder, the jury must find:

> (1) that the defendant killed the victim; (2) that the defendant had a specific intent to kill or to inflict great bodily harm; and (3) that the defendant was engaged in the perpetration or attempted perpetration of an aggravated burglary, and/or aggravated rape, and/or an armed robbery or simple robbery.

The second-degree murder instruction stated that in order to convict, the jury must find:

> (1) that the defendant killed the victim; [and] (2) that the defendant acted with the specific intent to kill or to inflict great bodily harm; or (1) that the defendant killed the victim whether or not he had an intent to kill or to inflict great bodily harm; and (2) that the killing took place while the defendant was engaged in the commission or attempted commission of an armed robbery or simple robbery or any of the crimes enumerated above.

For a manslaughter conviction, the judge stated that the jury must find:

> (1) that the defendant killed the victim; and (2) that the defendant had a specific intent to kill or inflict great bodily harm; and (3) that the killing was committed in sudden passion or heat of blood immediately caused by provocation sufficient to deprive an average person of his self-control and cool reflection. Or, (1) that the defendant killed the victim whether or not he had an intent to kill or

> to inflict great bodily harm; and (2) that the killing took place while the defendant was engaged in the perpetration or attempted perpetration of any felony not enumerated in the definition of either first-degree murder or second-degree murder or any misdemeanor directly affecting the person.

The judge then defined specific intent as:

> that state of mind which exists when the circumstances indicate that the defendant actively desired the prescribed [sic] criminal consequences to follow his act or failure to act.

Immediately thereafter, the trial judge charged the jury on the law of accomplice liability in Louisiana as follows:

> All persons concerned in the commission of a crime whether present or absent and whether they directly commit the act constituting the offense aid and abet in its commission, or directly or indirectly counsel or procure another to commit the crime [are] principals. In other words to be concerned in the commission of a crime, it must be shown that the person or persons charged did something knowingly and intentionally in furtherance of the common design, or to put it another way, that he or they aided, abetted and assisted in the perpetration of the offense. All persons knowing the unlawful intent of the person committing the crime who were present consenting thereto, and aiding and abetting, either by furnishing the weapons of attack, encouraging by words or gestures, or endeavoring at the time of the commission of the offense to secure the safety or concealment of the offender are principals and equal offenders and subject to the same punishment. To render one guilty as a principal, he must have committed the offense himself or in some way participated in the commission of the crime, or he must have aided, assisted or abetted the actual perpetrator of the

deed before it might be said that he was concerned in the commission of the crime.[2]

The jury returned a verdict of guilty of first-degree murder, and subsequently elected to impose the death penalty. The conviction was affirmed on direct appeal. *State v. Flowers*, 441 So.2d 707 (La. 1983). A state habeas corpus petition was orally denied after an evidentiary hearing in state district court on August 31, 1984. The Louisiana Supreme Court refused relief without an opinion. *State ex rel. Flowers v. Maggio*, 466 So.2d 1293 (La. 1985). An execution date of April 15, 1985 was set.

The instant petition was filed in the United States District Court for the Eastern District of Louisiana on April 11, 1985. The petition set forth the following grounds for relief: (1) jury instructions at the guilt/innocence phase of the trial were unconstitutional because they relieved the state of its burden of showing specific intent to kill; (2) jury instructions at the sentencing phase were unconstitutional for the same reason; (3) ineffective assistance of counsel; (4) improper jury selection; (5) inadequate appellate review of the sentence; (6) a *Miranda* violation; (7) electrocution is cruel and unusual punishment; (8) racial discrimination in sentencing; (9) capital punishment is an excessive penalty; and (10) the cumulative effect of "infirmities" in the trial and review constituted a due process violation. The petition and accompanying motion for stay of execution were denied in a one-page order on April 12. The dismissal was apparently pursuant to Rule 4, Rules Governing

---

[2]Prior to the instructions, the prosecutor stated in his closing argument that "[a]ll persons concerned in the commission of a crime are equally guilty of that crime."

It should be noted that defense counsel did not object to the charge as given or to the prosecutor's comments, despite the contemporaneous objection rule of La. Code Crim. P. art. 841. Further, the issue apparently was not presented to the Louisiana Supreme Court on direct appeal. However, the State has not raised the issue of the procedural bar of *Wainwright v. Sykes*, 433 U.S. 72, 87 (1977), in these proceedings, nor has it briefed or even mentioned the issue on appeal. "[W]e have repeatedly refused to examine issues not raised in the appellate briefs absent the possibility of injustice so grave as to warrant disregard of the usual procedural rules." *McGee v. Estelle*, 722 F.2d 1206, 1213 (5th Cir. 1984) (en banc) (refusing to examine *sua sponte* exhaustion requirement of § 2254(d)), and we refuse to do so here.

§ 2254 Cases in the United States District Courts, which allows fo summary dismissal of certain petitions without requiring servic on or an answer by the State.[3] The district court denied a certificat of probable cause for appeal.

Flowers applied to this court for a certificate of probable caus and a stay of execution. The court on April 12 granted the stay, an we remanded the case to the district court "with instructions that statement of reasons be provided for the denial of each clai presented," pursuant to the rule of *Willie v. Maggio*, 737 F.2d 137 1377 (5th Cir. 1984) (district court must set forth specific finding of fact and conclusions of law that underlie its ultimate conclusio to grant or deny relief). *Flowers v. Blackburn*, 759 F.2d 1194, 119 (5th Cir. 1985).

On April 16, 1985, again apparently pursuant to Rule 4 and with out any papers responsive to the petition having been filed by th State,[4] the district judge dismissed the petition as "without merit. On the jury instruction issue, the district court concluded that "n reasonable juror could have misconstrued the instructions given i such a way as to convict the defendant, petitioner, without a find ing that the petitioner, Flowers, had the requisite intent to kill. Flowers again sought a certificate of probable cause, and on Apr 23 we granted the application and remanded the case to the distric court, because at least three of the petition's arguments "cannot b adequately assessed without reference to the trial transcript." W

[3]Rule 4 states in full:

> The original petition shall be presented promptly to a judge of the district court in accordance with the procedure of the court for the assignment of its business. The petition shall be examined promptly by the judge to whom it is assigned. If it plainly appears from the face of the petition and any exhibits annexed to it that the petitioner is not entitled to relief in the district court, the judge shall make an order for its summary dismissal and cause the petitioner to be notified. Otherwise the judge shall order the respondent to file an answer or other pleading within the period of time fixed by the court or to take such other action as the judge deems appropriate. In every case a copy of the petition and any order shall be served by certified mail on the respondent and the attorney general of the state involved.

[4]The record indicates that Flowers' counsel mailed a copy of the petition t the State Attorney General and the appropriate District Attorney on April 1

included instructions "to obtain the record of the state court trial, to review petitioner's claims in the light of the record, and to enter new findings and conclusions as necessitated by the review." 759 F.2d 1195 (5th Cir. 1985).

On May 1, the district court again ordered the petition dismissed under Rule 4 without requiring an answer by the State.[5] It maintained its conclusion that the jury instructions were not flawed, and rejected all other claims presented. Flowers sought another certificate of probable cause. We granted the certificate and ordered the appeal docketed. The State has filed a brief in this court in opposition to the writ.

II.

This case presents the issue whether the jury instructions in this first-degree murder prosecution satisfy the principles of *In re Winship*, 397 U.S. 358 (1970), and its progeny, including *Sandstrom v. Montana*, 442 U.S. 510 (1979). Specifically, we must consider the aspects of the instruction that "to be concerned in the commission of a crime, it must be shown that the person . . . aided, abetted and assisted in the perpetration of the offense," and "[a]ll persons

[5]As a matter of procedure, the transcript or relevant portions of it are normally obtained by the district court from the State in its answer. Rule 5. However, because the district judge dismissed the petition under Rule 4, the State did not file an answer. The record is unclear by what means the district judge obtained the transcript of Flowers' trial. The certified copy of a state trial transcript is, of course, in the possession of the State. When it appears necessary for the district court to examine the state trial transcript, the district court should order service of the petition and an answer by the State pursuant to Rule 5, which controls transcript production issues.

Under these circumstances, the district court's use of a Rule 4 dismissal was inappropriate under the standard set forth in *Blackledge v. Allison*, 431 U.S. 63, 78 (1977) (only if allegations of petition, when measured against the record, are "patently false or frivolous," is summary dismissal appropriate). *See also Scott v. Estelle*, 567 F.2d 632, 633 (5th Cir. 1978) ("unless it appears from the face of the petition and exhibits that the petitioner is not entitled to relief, the district judge shall order the respondent to file an answer or to take other appropriate action"). Rule 4 allows the district court to "screen out *frivolous* applications and eliminate the burden that would be placed on the respondent by ordering an unnecessary answer." Advisory Committee Note to Rule 4 (emphasis added); *Williams v. Estelle*, 681 F.2d 946 (5th Cir. 1982).

knowing the unlawful intent of the person committing the crime who were present . . . are principals, and equal offenders, and subject to the same punishment." As stated in *Francis v. Franklin*, 105 S.Ct. 1965 (1985), "[t]he question is whether these instructions, when read in the context of the jury charge as a whole, violate the Fourteenth Amendment's requirement that the State prove every element of a criminal offense beyond a reasonable doubt. *See Sandstrom, supra; In re Winship*, 397 U.S. 358, 364 (1970)." *Franklin*, 105 S.Ct. at 1968. The Supreme Court in *Franklin* recently stated:

> The Due Process Clause of the Fourteenth Amendment "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 364 (1970). This "bedrock, 'axiomatic and elementary' " [constitutional] principle, *id.* at 363, prohibits the State from using evidentiary presumptions in a jury charge that have the effect of relieving the State of its burden of persuasion beyond a reasonable doubt of every essential element of a crime [citation omitted]. The prohibition protects the "fundamental value determination of our society," given voice in Justice Harlan's concurrence in *Winship*, "that it is far worse to convict an innocent man than to let a guilty man go free." 397 U.S. at 372.

Franklin, 105 S.Ct. at 1970-71.

[1] The following analytical approach is used in cases raising this issue. First, the court must determine whether based on the specific language of the instruction the challenged instruction creates a constitutionally objectionable "mandatory presumption," or "merely a permissive inference," on an essential element of the crime. *Franklin*, 105 S.Ct. at 1971 (citing *Sandstrom*, 442 U.S. at 514, 520-24; *Ulster County Court v. Allen*, 442 U.S. 140, 157-63 (1979)). Second, "[i]f a specific portion of the jury charge, considered in isolation, could reasonably have been understood as creating a presumption . . . . then the potential offending words must be considered in the context of the charge as a whole." *Franklin*, 105 S.Ct. at 1971 (citing *Cupp v. Naughten*, 414 U.S. 141, 147 (1973)).

A.

[2] The first prong of our analysis requires the court to "focus . . . on the specific language challenged." *Franklin*, 105 S.Ct. at 1971, to determine whether a mandatory presumption, either conclusive or rebuttable, or merely a permissive inference is created. "A mandatory presumption instructs the jury that it *must* infer the presumed fact if the State proves certain predicate facts. A permissive inference suggests to the jury a possible conclusion to be drawn if the State proves predicate facts, but does not require the jury to draw the conclusion." *Id.* (emphasis added). Permissive inferences violate the due process clause "only if the suggested conclusion is not one that reason and common sense justify in light of the proven facts before the jury." *Id.* (citing *Ulster County Court*, 442 U.S. at 157-63). Mandatory presumptions violate the due process clause "if they relieve the State of the burden of persuasion on an element of an offense." *Franklin*, 105 S.Ct. at 1971 (citing *Patterson v. New York*, 432 U.S. 197, 215 (1977); *Sandstrom*, 442 U.S. at 520-24; *Mullaney v. Wilbur*, 421 U.S. 684, 698-701 (1975)).

[3] Before we may determine whether a challenged instruction relieved the State of the burden of persuasion on an element of the crime of which the defendant was convicted, we must examine the elements of the crime under state law. *Clark v. Louisiana State Penitentiary*, 697 F.2d 699, 700 (5th Cir. 1983); *cf. United States v. Merkt*, 764 F.2d 266, 272 (5th Cir. 1985). Flowers was convicted of first-degree murder, which at the time of his trial was defined as follows:

> First degree murder is the killing of a human being:
>
> (1) When the offender has specific intent to kill or to inflict great bodily harm and is engaged in the perpetration or attempted perpetration of an aggravated kidnapping, aggravated escape, aggravated arson, aggravated rape, aggravated burglary, armed robbery, or simple robbery. . . .

La. Rev. Stat. Ann. § 14:30 (West Supp. 1985). Further, as the jury was charged, under the Louisiana law of accomplice liability, La. Rev. Stat. Ann. 14:24 (West 1974), "[a]ll persons concerned in the

commission of a crime, whether present or absent, and whethe they directly commit the act constituting the offense aid and abet i its commission, or directly or indirectly counsel or procure anothe to commit the crime, are principals." However, long before Flow ers' trial, the Louisiana Supreme Court placed an important limita tion on the use of accomplice liability for specific intent crime such as first-degree murder:

> Under R.S. 14:24, not all principals are automatically guilty of the same grade of offense. One who aids and abets in the commission of a crime may be charged and convicted with a higher or lower degree of the crime depending upon the mental element proved at trial. . . . Thus, an individual may only be convicted as a principal for those crimes for which he has the requisite mental state. *In the case of a first degree murder conviction, the requisite mental state is that the defendant had the specific intent to kill. It is not enough to find merely that his co-conspirator or accomplice had the necessary mental state, since this intent cannot be inferred to the accused.* It must also be shown that this accused also had the specific intent to kill.

State v. Holmes, 388 So.2d 722, 726 (La. 1980) (emphasis added).[6] Other Louisiana courts have reiterated this requirement. *See, e.g.*,

[6]The challenged instruction in *Holmes*, which was upheld, stated as follows:

> "The law as to principals reads as follows: All persons concerned in the commission of a crime, whether present or absent, and whether they directly commit the act constituting the offense, aid and abet in its commission or directly or indirectly counsel or procure another to commit the crime are principals. One who aids and abets in the commission of a crime may be charged and convicted with a higher or lower degree of crime depending on the mental element proved at trial. The first degree murder statute, with which this defendant is charged, requires proof of specific intent on the part of this defendant. I have previously read to you the definition of specific criminal intent."

388 So.2d at 725. The obvious difference between the *Holmes* instruction and Flowers' instruction is the last three sentences of the *Holmes* instruction, which were simply not given to the jury here. The trial judge in *Holmes* carefully explained that regardless of the law of principals, in order to convict for first-degree murder the jury must find that the defendant had a specific intent to kill. The trial judge here did not do so.

State v. Kohler, 434 So.2d 1110, 1118-19 (La. App. 1st Cir. 1983). Therefore, as a matter of Louisiana law, the State was obligated to prove that *Flowers* "subjectively desired the prohibited result," *id.* at 1119, in order to support *Flowers'* conviction for first-degree murder.

[4] The jury instruction in this case that all participants in a crime "are principals, and equal offenders, and subject to the same punishment," plainly "relievfed] the State of the burden of proof enunciated in *Winship* on the critical question of ... state of mind." *Sandstrom*, 442 U.S. at 521. In effect, the charge permitted the State to secure a conviction by showing that *either* Grant *or* Flowers had the requisite specific intent to kill. With ample evidence that the killing was intentional and that only Flowers and Grant were involved in the crime, the instruction could have been reasonably interpreted by a juror to mean that the State was not required to introduce evidence on Flowers' subjective intent.[7] The instruction could have been interpreted as creating a mandatory—and conclusive—presumption that if either perpetrator had a specific intent to kill, then Flowers had a specific intent to kill. That is simply prohibited by Louisiana state law and hence by the due process clause.

[5] This instruction is every bit as objectionable as the one found to be constitutionally infirm in *Clark v. Louisiana State Penitentiary*, 694 F.2d 75 (5th Cir. 1982), *modified on reh'g*, 697 F.2d 699 (5th Cir. 1983). The instruction in *Clark*, also a case involving two defendants accused of first-degree murder in connection with an

[7]The State's brief contains the following concession: "The State admits that Petitioner's assertion of innocence at trial might have created the possibility of an unconstitutional conviction *had there been any evidence at all produced implicating Grant as the murderer.*" Brief of Appellee at 9 (emphasis in original). Evidence that Grant was the murderer was, of course, introduced *by the State* in the form of Flowers' post-arrest "confession," which stated that Grant had killed the victim. Therefore, the State all but expressly admits that this conviction was unconstitutional. The jury had evidence before it that either Grant or Flowers had done the killing, that both helped plan the robbery, and that the killing was intentionally committed during the course of a robbery or rape. They also had an instruction that the specific intent of one perpetrator could be imputed to the other, despite the rule of *State v. Holmes*. Under these circumstances, the trial judge effectively withdrew the issue of Flowers' subjective intent from the jury.

armed robbery, included a criminal conspiracy instruction tha each co-conspirator "is deemed to assent to" whatever is done i furtherance of the conspiracy. This court determined the instruc tion violated the due process clause because it permitted a convic tion of first-degree murder based on a finding that *either* participan in the crime had a specific intent to kill, which was not allowe under Louisiana law. To paraphrase *Clark:*

> An instruction to the jury to deem [Grant's] acts to be intended by [Flowers] relieved the prosecution of its burden [to prove under Louisiana law that Flowers intended to kill or do great bodily harm] in violation of *Mullaney*, and cast the burden of disproving that intent upon [Flowers], in violation of *Sandstrom*. . . .
>
> Before the constitution will allow the conviction . . . we must know that the jury found beyond any reasonable doubt that [Flowers], personally, did have that mind to kill.

694 F.2d at 77-78. *See also Garland v. Maggio*, 717 F.2d 199, 203 (5th Cir. 1983) (instruction that "effectively relieves the state of its constitutional burden of proving the element of requisite intent" violated due process clause).[8] A reasonable juror could have concluded that the State needed to show only that either Flowers or Grant killed the victim with the requisite specific intent, and that the burden was on Flowers to prove that neither he nor Grant had specific intent. Therefore, standing alone, the challenged instruction relieved the State of its affirmative burden of persuasion on one crucial element of the crime charged.

---

[8]Counsel for the State stated at oral argument that *Clark* and *Sandstrom* are distinguishable from this case because the former were "conspiracy cases," and this is a case involving the law of principals. In addition to being simply wrong about *Sandstrom* being a conspiracy case, 442 U.S. at 512, a case that involved only one actor, counsel's argument misconceives the nature of our inquiry. We examine whether Louisiana state law would permit a first-degree murder conviction without proof of the defendant's specific intent in a situation where two or more individuals were involved in the homicide. *Holmes* answers that question in the negative. 388 So.2d at 726.

B.

[6] Obviously, the jury heard more than the several sentences challenged and discussed above. "The jury charge taken as a whole might have explained the proper allocation of burdens with sufficient clarity that any ambiguity in the particular language challenged could not have been understood by a reasonable juror as shifting the burden of persuasion." *Franklin*, 105 S.Ct. at 1973 (citing *Cupp v. Naughton*, 414 U.S. at 147). The State contends that the trial court's instructions were not "erroneous or prejudicial." It argues that the "jury was clearly instructed that specific intent is an essential element of the crime of first degree murder." Appellee's Brief at 7. True enough. The instructions required that the jury find the killing was intentional in order to convict Flowers of first-degree murder; their flaw was that they did not specify *who* must possess the requisite intent in order to find Flowers guilty.

[7] Admittedly, the instructions did state in several places that the jury must find that "the defendant"—Flowers—acted with specific intent. But the unequivocal language of the flawed aspect of the instruction could have led a reasonable juror to conclude that his job was over when he determined that *someone* had killed the victim with specific intent. Nowhere in the instruction are the flawed sentences contradicted or minimized. Nowhere do the instructions state that *only* Flowers' intent was at issue, and in that regard, they stand in sharp contrast to those in *Holmes*, 388 So.2d at 725. The general instructions on the elements of the crime "are not 'rhetorically inconsistent' " with an instruction that permitted—or indeed, required—the jury to impute specific intent from one principal to another. *Franklin*, 105 S.Ct. at 1974 (quoting *Sandstrom*, 442 U.S. at 518-19 n.7). Again paraphrasing the court in *Clark*:

> The [intent-imputing] instruction may not have been read by any juror as affecting the requirement that they find [Flowers] guilty of lethal purpose. On the other hand, the jurors may have accepted the literal meaning of the instruction as stated above. The fact that a reasonable juror could have done so means that we must discount the possibility that the jurors actually did proceed as the trial court intended. *See Sandstrom*. We are left with "a level of

> uncertainty and unreliability [in] the fact-finding process that cannot be tolerated in a capital case." *Beck v. Alabama*, 447 U.S. 625, 643 (1980).

694 F.2d at 78.

[8] A reasonable juror in this case might have concluded that his examination of the specific intent element of the crimes charged needed to go no further than a finding that either Flowers or Grant acted with specific intent to kill. A reasonable juror could have been in the "quandary," *Franklin*, 105 S.Ct. at 1976, of choosing between the instruction that they must find that "the defendant" acted with specific intent, and the instruction that the intent of one principal could be imputed to the other. The charge read as a whole does not alleviate the error. Therefore, the jury charge violated Flowers' right to due process.[9]

III.

[9] For the foregoing reasons,[10] the order of the district court is

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[9]The State does not expressly discuss whether the harmless error doctrine applies on the basis of the record evidence in this case, and does not cite the controlling cases on the issue. The Supreme Court has not resolved whether the harmless error doctrine is applicable to a *Sandstrom* error. *See Franklin*, 105 S.Ct. at 1977; *Connecticut v. Johnson*, 460 U.S. 73, 86-87 (1983) (plurality opinion of Blackmun, J.). Although there is precedent to the contrary, *Hammontree v. Phelps*, 605 F.2d 1371, 1380 (5th Cir. 1979), recent cases in this circuit have applied a harmless error test to *Sandstrom*-violative jury instructions. *Garland*, 717 F.2d at 203; *see generally Johnson v. Maggio*, F.2d —, — n.4 (No. 84-4077) (5th Cir. 1985).

However, reading the State's brief broadly, the State seems to raise a harmless error argument by contending that "the evidence against Petitioner [as the sole murderer] was overwhelming." Brief of Appellee at 9. If evidence of Flowers' intent to kill was indeed overwhelming, the harmless error doctrine might be applicable. *Garland*, 717 F.2d at 203. However, even recognizing that intent is usually proved only by circumstantial evidence, the evidence of *Flowers'* intent is far from "overwhelming." The victim was raped by a man with type O blood. Grant and Flowers both have type O blood, as does 40 percent of the population. The State's experts testified that Flowers' shoe "could possibly" have left the mark on the victim's neck, and that a belt similar to Flowers' "could" have produced the abrasions on her neck. This falls far short of "overwhelming" evidence. *Compare id.* at 207 & n.9.

[10]Due to our disposition of this appeal, we need not consider the other contentions raised by Flowers in his petition.

reversed and this case is remanded to the district court with instructions to grant the petition unless the State provides Flowers with a new trial commencing within 120 days.

REVERSED AND REMANDED.

B

APPENDIX "B"

Stay Order Of Mandate

Consisting Of Page B-1

United States Court of Appeals

FIFTH CIRCUIT

T F. GANUCHEAU
CLERK

OFFICE OF THE CLERK
600 CAMP STREET
NEW ORLEANS, LA 70130

January 30, 1986

COMM FTS
(504) 589 632

CASE INQUIRIES
East. & Mid. LA 6194
No. & West. TX 2167
So. & East. TX 6131
MS. Agency & West. LA 2892
5514

RECEIVED
FEB 3 1986

William C. Credo
istant District Attorney
Courthouse Annex
ina, LA 70053

- 2 -

No. 85-3315 - James Flowers -vs- Frank Blackburn

USDC# CA-85-1564

MANDATE STAYED TO AND INCLUDING MARCH 1, 1986

s Court has this day granted a stay of the issuance of the date to the date as shown above. If during the period of the y there is filed with this office a notice from the Clerk of Supreme Court that the party who has obtained the stay has ed a petition for the writ in that court, the stay shall con- ue until final disposition by the Supreme Court. Upon the fil- of a copy of an order of the Supreme Court denying the petition writ of certiorari, the mandate shall issue immediately under le 41, FRAP.

ar revised Rule 19.1 of the Supreme Court, effective June 30, 80, a request to certify the record prior to action by the preme Court on the petition for certiorari should not be made as matter of course but only when the record is deemed essential to proper understanding of the case by that court.

copy of the opinion, judgment, or Rule 47.6 Decision, and denial rehearing are still required by the Supreme Court to be incorpo- ted as an appendix to your petition. Enclosed are copies of the id documents which have been entered in this cause.

Very truly yours,

GILBERT F. GANUCHEAU, Clerk

By: Karen L. Comeaux
Deputy Clerk

closures

: Ms. Michelle Gaudin

C

APPENDIX "C"

Transcript of State Evidentiary Hearing

State of Louisiana
vs.
James Flowers

Pages 113, 114, 132 And 272

Consisting Of Pages C-1 Thru C-7

TWENTY-FOURTH JUDICIAL DISTRICT COURT

PARISH OF JEFFERSON

STATE OF LOUISIANA

STATE OF LOUISIANA	*	NUMBER 81-3950
VERSUS	*	DIVISION "L"
JAMES FLOWERS	*	

* * * * * * * * * * * * *

Transcript of testimony and proceedings taken in the above numbered and entitled cause on Friday the 31st day of August, 1984, before the Honorable Lionel R. Collins, Judge, presiding.

APPEARANCE:

WILLIAM C. CREDO, III, Esq.
Assistant District Attorney

FRANK DeSALVO, Esq.
MICHELLE GAUDIN, Esq.
Attorneys for Defendant

REPORTED BY: SUSAN STENTZ, O.C.R.

(Taken from page 113 and 114 of State Evidentiary Hearing, August 31, 1984.)

* * * *

(BY MR. BEEVERS:)

A. That, Mr. DeSalvo, is not so. At that point I was very adequately prepared, Mr. Flowers himself had told me about the statement, why he gave it, and he also told me what the truth was and that was the reason I did not put him on the stand to rebut portions of that statement. In my professional opinion, it was, it would have been subording perjury, which I told him earlier in the trial that I would not do.

(BY MR. DeSALVO)

Q. And for that Mr. Beevers you should be commended, because we don't suborn perjury but, what independent evidence did you seek that could have corroborated the statement

that was introduced by the State that was exculpatory to James Flowers?

A. There was no independent evidence to seek for Mr. Flowers had told me the truth, and if I had gotten anything to submit to the Court to bolster up the exculpatory part of that statement, I would have been subording perjury.

Q. If that statement said Mr. Beevers, that he could hear a scream from the place where he was, from the place where that lady was, could you have attempted to corroborate the ability to hear that without subording perjury?

A. Sir, he admitted to me that that was not true, that he was in there with Olin Grant and that he had, in fact, kicked the lady in the throat and choked her with a belt and, based upon that, I could see no reason to seek any perjured or bogus evidence to support a

statement that he had given to the police, which he admitted to me was not correct.

Q. Mr. Beevers, I know you feel a lot better now that you got all of that off your chest. Let's see if we can answer the questions. Is it your testimony that it would be perjury to introduce evidence that you could hear a scream from point A to point B when, in fact, it could be heard?

A. Sir, that would not be perjury.

Q. Is it your testimony that it would be improper for a lawyer to attempt to investigate, to try to find out whether or not that could exist?

(Taken from page 132 of State Evidentiary Hearing, August 31, 1984.)

* * * *

(BY MR. CREDO)

Q. And isn't it a fact that you have had numerous second degree murder cases, what, over ten capital cases?

A. I think I've had six capital cases.

Q. With respect to your interviews at the jail with Mr. Flowers, from the time you first saw Mr. Flowers until the time of trial, did his story ever change?

A. His story never changed but as I would develop other facts or other facts would come to my knowledge and I would ask him about them, he would admit them and his story, you might say, expanded but, it never did change.

Q. But it never did change from its initial -- except the fact that he admitted his guilt to you, that's the only significant change, is that right?

A. That's correct.

Q. Would you tell the Court why you didn't request any investigator in this trial?

A. I didn't feel like I needed any.

Q. Now, you have requested investigators in other cases?

A. That's correct.

(Taken from page 272 of State Evidentiary Hearing August 31, 1984.)

* * * *

THE COURT:

. . . not so sure the other things that the doctor sai would have been helpful to the defendant at th penalty phase. But I did note that Doctor Ritter di mention that the defendant had no pain of guil even when he examined him a couple of days ag Mr. Beevers' testimony was that he did, in fact, ta with the defendant on those occasions and that th defendant indicated to him he did not want membe of his family to be witnesses at the trial and, h further testified that the defendant admitted to hi that he did participate in the killing of this lady an that he was in the house. Many members of th family for the defendant testified that he was good man and a very likeable young man and he wa

a hard working young man and therein lies the difficulty that I have. Because what Doctor Ritter testified to was somewhat different than what members of the family testified to. The members of the family said he was a good fellow and Doctor Ritter would have indicated that he was a drug user, that he did not get along too well and that he had many problems. . .

85-1476

NO.

Supreme Court, U.S.
FILED
MAR 24 1986
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1985

FRANK BLACKBURN, WARDEN
LOUISIANA STATE PENITENTIARY,
PETITIONER

versus

JAMES FLOWERS,
RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI TO
UNITED STATES COURT OF APPEAL
FOR THE FIFTH CIRCUIT

SUPPLEMENTAL APPENDIX

JOHN M. MAMOULIDES
DISTRICT ATTORNEY
24TH JUDICIAL DISTRICT
PARISH OF JEFFERSON
STATE OF LOUISIANA

DOROTHY A. PENDERGAST
WILLIAM C. CREDO, III
ASSISTANT DISTRICT ATTORNEYS
RESEARCH & APPEALS
OFFICE OF THE
DISTRICT ATTORNEY
NEW COURTHOUSE ANNEX
GRETNA, LOUISIANA 70053
TELEPHONE: (504) 368-1020

APPENDIX "D"

Judgment

And

Findings Of Fact And Conclusions Of Law

Of The

United States District Court

For the Eastern District Of Louisiana

Consisting Of Pages D-1 Thru D-20

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

JAMES FLOWERS	CIVIL ACTION
VERSUS	NO. 85-1564
ROSS MAGGIO, Warden Louisiana State Penitentiary, Angola	SECTION "J"

JUDGMENT

Pursuant to the findings fo fact and conclusions of law rendered this date,

IT IS ORDERED, ADJUDGED and DECREED that the Application of or Writ of Habeas Corpus be and is hereby DENIED.

New Orleans, Louisiana, this the 1st day of May, 1985.

s/PATRICK E. CARR
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

JAMES FLOWERS	CIVIL ACTION
VERSUS	NO. 85-1564
ROSS MAGGIO, Warden Louisiana State Penitentiary, Angola	SECTION "J"

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Petitioner, James Flowers, seeks habeas corpus relief and a stay of execution. This Court originally denied all relief and rendered its reasons for so doing on April 16, 1985. The Fifth Circuit Court of Appeals vacated and remanded this cause with instructions to obtain and review the transcript of the trial proceedings in state court, to review Petitioner's claims in light of that record and to enter new findings and conclusions as necessitated. Having reviewed the transcript of the trial proceedings in state court, and having re-examined Petitioner's claims in light of those proceedings, this Court hereby renders the following findings of facts and conclusions of law.

Petitioner asserted ten separate grounds for relief. First Petitioner asserted that the jury instructions at the guilt/innocence trial were unconstitutional in that the instructions impermissably relieved the state of its burden of proving specific intent to kill beyond a reasonable doubt. Petitioner specifically asserted that the following instruction was unconstitutional in that it allowed the jury to convict without a finding that petitioner had the requisite intent to kill:

> In other words to be concerned in the commission of a crime, it must be shown that the person or persons charged did something knowingly and intentionally in furtherance of the common design, or to put it in another way, that her or they aided, abetted and assisted in the perpetration of the offense.
>
> All persons knowing the unlawful intent of the person committing the crime who were present, consenting thereto, and aiding or abetting, etiher (sic) by furnishing the weapons of the attack, encouraging by words or gestures, or endeavoring at the time of the commission of the offense, to secure the safety or concealment of the offender, are principals, and equal offenders, and subject to the same punishment.

In support of this assertion, Petitioner cited Clark v. Louisiana State Penitentiary, 694 F.2d 75 (5th Cir.

1982). This Court finds that the jury instructions given in Clark are distinguishable from those of the case at bar. In Clark, the instructions were such as to allow a reasonable juror to deem a co-defendants (sic) acts to be intended by Clark, thereby relieving the state of its burden of proving specific intent to kill on the part of Clark.

In the case at bar, no reasonable juror could have misconstrued the instructions given in such a way as to convict the defendant, Petitioner, without a finding that the Petitioner had the requisite intent to kill. The instructions as a whole were clear. The trial judge repeatedly instructed the jury that they could not convict the defendant of first degree murder unless they found that the defendant had killed or had the specific intent to kill:

> First degree murder is the killing of a human being:
>
> When the offender has the specific intent to kill or to inflict great bodily harm and is engaged in the perpetration or attempted perpetration of (one of the following crimes).

(Jury instructions, Tr. Vol. I, pg. 57)

* * * * * * * * * * *

Thus, in order to convict the defendant upon this definition of first degree murder you must find:

1) That the defendant killed the victim; and

2) That the defendant had the specific intent to kill or to inflict great bodily harm; and

3) That the defendant was engaged in the perpetration or attempted perpetration of (one of the following crimes).

(Jury instructions, Tr. Vol I, pg. 60)

Additionally, the trial judge instructed the jury on the meaning of specific and general intent:

Criminal intent may be specific or general.

Specific criminal intent is that state of mind which exists when the circumstances indicate that the defendant actively desired the prescribed criminal consequences to follow his act or failure to act.

General criminal intent is present when the circumstances indicate that the defendant must have adverted to the prescribed criminal consequences as reasonably certain to result from his act or failure to act. General criminal intent is always present when there is specific intent.

Whether criminal intent is present must be determined in light of ordinary experience. Intent is a question of fact which may be inferred from the circumstances. (emphasis in original)

(Jury instructions, Tr. Vol I, pg. 63)

Thus, a reading of the given instructions as a whole leads this Court to conclude that the jury could not have convicted the defendant of first degree murder unless it found that defendant had the specific intent to kill. Additionally, that portion of the jury instruction which Petitioner quoted to this Court as being defective was taken completely out of context. Indeed, Petitioner misled this Court by failing to quote the entire passage. Where Petitioner's quotation ends, the jury instructions continue as follows:

> To render one guilty as a principal he must have committed the offense himself or in some way participated in the commission of the crime, or he must have aided or abetted the actual perpetrator of the deed before it might be said that he was concerned in the commission of the crime. Mere presence at the time the offense is committed without intention to participate or in any way contribute to its commission, is not sufficient to make one a principal. Mental approval or sympathy with the perpetrator of the crime or with the act done, or acquiescence in its commission, or failure to make any effort to prevent its commission or to apprehend the offender is not sufficient to make one a principal. Mental approval or sympathy with the perpetrator of the crime or with the act done, or acquiescence in its commission, or failure to make any effort to prevent its commission or to

> apprehend the offender is not sufficient to make one a principal. Thus, one who does nothing to encourage or aid in its commission, cannot be said to be a principal unless he be present acting in concert with the actual perpetrator of the offense for the purpose of assisting, if necessary, or of watching and preventing interference or detection, or for the purpose of lending encouragement to the perpetrator or to the commission of the offense.

(Jury instructions, Vol I, pp. 66-67)

Thus, the state trial court judge thoroughly negated any possibility of a conviction based upon the imputation of intent to another. To put it another way, the jury was made well aware that it could not convict the defendant of the charge of first degree murder without a finding of the requisite intent. The government was not relieved of its burden of proof. The Court therefore concludes that Petitioner's first ground for relief is meritless.

Petitioner's second ground for relief is related to the first ground and is equally without merit. Petitioner asserted that the trial court erroneously failed to re-instruct the jury at the sentencing phase that they could not return a death sentence unless

Petitioner had killed or had the specific intent to kill, citing Enmund v. Florida, 458 U.S. 782, 102 S.Ct. 3368 (1982); Reddix v. Thigpen, 728 F.2d 705, rehearing den., 732 F.2d 494 (5th Cir. 1984); and, Skillern v. Estelle, 720 F.2d 839 (5th Cir. 1983).

First, the Court notes that there is no requirement that the state trial court re-instruct the jury at the sentencing phase. The state trial judge properly instructed the jury at the sentencing phase as to the aggravating and mitigating circumstances which they should examine in recommending the penalty to be imposed. (Tr. Vol. I, pp. 70-73).

Second, having previously determined that the jury was properly instructed at the guilt/innocence phase, and further having found that the jury could not have found Petitioner guilty of first degree murder without specifically finding that Petitioner had intended to kill, the Court finds that there was no continuation of error into the sentencing phase.

Third, the Enmund line of cases cited by Petitioner are clearly distinguishable from the case at

bar. In Enmund the court had affirmatively instructed the jury that the defendant could be convicted without a finding that the killed or intended to kill. In Reddix, the jury was led to believe it could convict by imputing the intent of the accomplice to the petitioner. In Skillern, the court upheld instructions which permitted a conviction on the substantive offense without a finding of personal culpability and further upheld separate sentencing instructions which the court found did not violate the Enmund rule which prohibits capital punishment imposed on one based upon the act of an accomplice. Skillern did not impose any requirement that separate instructions be given at the sentencing phase.

Therefore, Petitioner's claim is not supported by this line of cases for the instructions given in his trial were not misleading and clearly spelled out the elements needed for a conviction of first degree murder. The requisite intent being found, the jury was permitted to return the death penalty. Enmund, supra.

The third ground for relief asserted by Petitioner was that he had ineffective assistance of counsel. On this ground, a full evidentiary hearing was held in the state court on Petitioner's state habeas petition. A thorough review of the transcript of that hearing reveals that the state judge heard evidence on each of the specific challenged instances of conduct. The judge concluded first, that Petitioner failed to show his counsel's conduct was deficient, i.e., that Petitioner had reasonably effective assistance of counsel, and, second, that even assuming that counsel's conduct was deficient in the challenged respects, Petitioner did not suffer prejudice in that he failed to show a reasonable probability that the outcome of the case would have been different. This Court can find no manifest error in the state court's conclusions. Strickland v. Washington, 104 S.Ct. 2052, (1984)

The Petitioner next sought relief on the ground that jurors with reservations about capital punishment were improperly excluded. In his petition for relief, Petitioner claimed:

> Although these jurors, Nelson and Camut, expressed severe reservations concerning capital punishment and expressed an extreme reluctance to consider the imposition of the death penalty, they did not make it unmistakeably clear that they would automatically vote against the death penalty regardless of the facts and circumstances, so they could not properly be excluded for cause according to the test of Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770 (1968). (emphasis in original)

Federal Habeas petition, Pg. 12)

A reading of the trial transcript reveals that the petition utterly mischaracterizes and misrepresents the responses of the jurors to questions of the voir dire. On questioning, Mr. Camet revealed a moral conviction against the imposition of the death penalty of some duration. (Tr. Vol II, pp. 319-320) More extensive questioning ensued:

> Q. . . . Could you consider the imposition of the death penalty as a possible alternative if the evidence so warrants it?
>
> A. No, I don't think I could. No.
>
> Q. Is there any circumstances in your mind that you could consider the imposition of the death penalty?
>
> A. No.

Q. No matter how heinous the crime, no matter what evidence the State may present to you. Okay, you, under no circumstances, because of your long standing personal and moral beliefs do not feel that that would be an appropriate sentence?

A. I would not respond to the crime of murder with a death penalty.

Q. Okay. You don't feel that the death penalty is an appropriate sentence of murder, or for any crime?

A. Yes, that is what I am saying.

* * * * * * * * * * *

Q. You could consider life, but you could not consider the death penalty?

A. That is correct.

* * * * * * * * * * *

Q. . . .Your testimony is that under no conceivable set of circumstances could you vote for the death penalty.

A. That is correct.

(Voir dire of Mr. Camet. Tr. Vol. II, pp. 320-322)

The second juror, Mr. Nelson, revealed that he could not impose the death penalty due to a religious conviction. (Tr. Vol II, pp. 348-349) Again, extensive questioning ensued:

Q. . . . Sir, you mentioned that you have personal feelings against the imposition of the death penalty?

A. Right.

Q. Have you had that for quite some time?

A. Right.

Q. And that would be regardless of what the evidence would show?

A. Right.

* * * * * * * * * * *

Q. And what you're telling me is that regardless of the circumstances, regardless of what the evidence would show, you could not even consider the death penalty as an appropriate sentence, as an appropriate verdict in this case?

A. Well I think it would be more or less against my religion.

Q. Against your religion. I will give you one that may be personal to you, if this was the trial of the rape and murder of your cousin, okay. And you were on the jury, could you consider the death penalty?

A. No, sir.

* * * * * * * * * * *

Q. So, what you're saying under no circumstances, no matter what the evidence would show, would you ever consider the imposition of the death penalty?

A. I would prefer life.

Q. You could not consider it?

A. Not death.

Q. That is because of your religious beliefs?

A. Yes?

* * * * * * * * * * *

Q. Mr. Nelson, do you appreciate the fact that the law requires that you only consider the death penalty as an appropriate penalty, and then you can either vote to accept it or reject it?

A. Right. Well, if it was up to me, I would reject it right off.

Q. No matter what anyone had ever done?

A. Well, I was always taught that you would never take a life.

Q. Mr. Nelson, the requirement is that you only be able to consider, and if you were in the courtroom yesterday, you probably heard me ask a prospective juror if she could vote for the death penalty for Adolph Eichmann who was a man who put six million Jew in the gas chamber. Okay. And I now ask you if evidence came out on the stand that somebody had murdered six million people, could you consider the death penalty?

A. Well, I think along the line that he would have to answer himself, why should I give him the death penalty.

Q. I didn't quite understand that answer. Even for Adolph Eichmann --

A. In other words, he would have to answer for himself. It's not for me to judge, you know. I mean as far as I had to convict whether he was guilty or not, yeah, but to impose the death penalty, I wouldn't.

(Voir dire of Mr. Nelson. Tr. Vol II, pp. 348-351)

As can be seen, these jurors clearly passed the stringent Witherspoon test which states that jurors may properly be excluded for cause if they make it "unmistakeably clear" that they would "automatically" vote against capitol punishment without regard to the evidence. Witherspoon v. State of Illinois, 391 U.S. 510, 88 S.Ct. 1770 (1968). Furthermore, the Witherspoon test has been modified. Wainwright v. Witt, (U.S. S.Ct. No. 83-1427, slip opinion, decided January 21, 1985); Adams v. Texas, 448 U.S. 38, 100 S.Ct. 2521 (1980).

> We therefore take this opportunity to clarify our decision in Witherspoon, and to reaffirm the above-quoted standard when a prospective juror may be excluded for cause because of his or her views on capitol punishment. That standard is whether the juror's views would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." We note that, in addition to dispensing with Witherspoon's reference to "automatic"

> decision making, this standard likewise does not require that a juror's bias be proved with "unmistakeably clarity." This is because determinations of juror bias cannot be reduced to question-and-answer sessions which obtain results in the manner of a catechism.

Wainwright, supra at pp. 11-12.

The Wainwright Court went on to explain that because of the nature of the voir dire, and the lack of clarity in the standard for juror exclusion, great deference must be accorded the trial judge's findings which are presumed correct under 28 U.S.C. 2254(d). Wainwright, supra at pp. 13-17.

Based on the foregoing, this Court concludes that the two jurors in question were properly excluded for cause. This Court will not second guess the state trial judge, who had the advantage of observing and listening to the jurors. This fourth ground for relief asserted by Petitioner lacks merit.

For a fifth ground for relief, Petitioner asserted that the State Supreme Court's review of the Petitioner's sentence was constitutionally inadequate in that the Court only reviewed death sentences within

the same judicial district instead of reviewing death sentences on a state wide basis. Petitioner compared his own proportionality review (State v. Flowers, 442 So.2d 704 (La. 1981)) with that of the defendant in State v. Narcisse, 426 So.2d 118 (La. 1983).

In Narcisse, the Court reviewed similar murder prosecutions on a state wide basis. Although the Court did not express its reason for doing so with specificity, the reason is patent on the face of the opinion. In Narcisse, there had only been four (4) murder prosecutions in the same district as the defendant, and only in the defendant's case was the death penalty returned. In order to adequately review the imposition of the death penalty in the Narcisse case, therefore, the Court examined similar cases in other judicial districts. 426 So.2d at 138.

On the other hand, in the case at bar, the Supreme Court reviewed twenty-two first degree murder cases in the defendant, Petitioner's district. Of those twenty-two, the death penalty had been imposed six times with the Court concluding that the imposition

of the death penalty in the Flowers case was not disporportionate (sic). 441 So.2d at 718-19.

This Court concludes that the review of Petitioner's sentence was not deficient and did not violate the Petitioner's constitutional rights. The State Supreme Court adequately reviewed the sentence before affirming the imposition of the death penalty. See also, Baldwin v. Blackburn, 653 F.2d 942 (5th Cir. 1980).

The sixth ground for relief asserted by Petitioner equally lacks merit. Petitioner asserted that statements introduced at trial were inadmissable as being unconstituionally obtained pursuant to a stop and subsequent arrest made without probable cause. The Louisiana Supreme Court exhaustively reviewed this ground in State v. Flowers, supra at 711-715. This Court finds no manifest error in the State Supreme Court's determination that the inculpatory statements and evidence were properly admitted at trial.

Petitioner's seventh, eighth, ninth and tenth grounds for relief are general in nature and are not

supported by case law. The seventh ground asserted is that electrocution is cruel and unusual punishment and that in light of other available methods involving unconsciousness and death without pain, the method to be employed violates the Eighth and Fourteenth Amendments to the United States Constitution.

Louisiana prescribes that execution will take place by electrocution. La. R.S. 15:569. This Court cannot act as super legislature; nor can this Court agree that electrocution is "cruel and unusual punishment" within the meaning of the Constitution. Watson v. Blackburn, ____ F.2d ____ (5th Cir. #85-3152, March 18, 1985).

The eighth ground for relief asserted that the sentence is invidiously discriminatory in that it is overwhelmingly imposed against males and poor persons. Louisiana's capitol punishment scheme had been upheld and this Court finds that the scheme for review of death penalty cases in Louisiana passes constitutional muster. See, Baldwin, supra; Watson, supra.

The ninth ground asserted that the death penalty is excessive and cannot be justified. This Court is bound by the United States Supreme Court's repeated holdings that the death penalty is in fact constitutional and can justifiably be imposed.

The final ground asserted generally that the cumulative effect of state and federal constitutional violations is a violation of itself of Petitioner's constitutional rights. Finding no violations of Petitioner's rights, this Court concludes that this last assertion is equally without merit.

In summary, the Court finding that the Petitioner has asserted no valid claim upon which the requested relief could be granted, the Application for a Writ of Habeas Corpus should be denied. Judgment shall be rendered accordingly.

New Orleans, Louisiana, this the 1st day of May, 1985.

s/ PATRICK E. CARR
UNITED STATES DISTRICT JUDGE

EDITOR'S NOTE

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Supreme Court U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

NO. 85-1476

FRANK BLACKBURN, WARDEN
Louisiana State Penitentiary,

Petitioner,

v.

JAMES FLOWERS,

Respondent

RESPONDENT'S BRIEF IN OPPOSITION TO PETITIONER'S PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Michele Gaudin
614 Tchoupitoulas Street
New Orleans, La. 70130
(504) 524-7727

COUNSEL FOR JAMES FLOWERS

8 PP

REASON WHY THE PETITION FOR WRIT OF CERTIORARI SHOULD NOT BE GRANTED

I.

THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT PROPERLY DETERMINED THAT THE JURY INSTRUCTIONS GIVEN BY THE TRIAL COURT AT THE GUILT/INNOCENCE PHASE OF REPONDENT'S TRIAL WERE UNCONSTITUTIONALLY BURDEN-SHIFTING AND THEREFORE A VIOLATION OF THIS COURT'S DECISION IN SANDSTROM VS. MONTANA, 442 US. 510, (1979)

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IN THE SUPREME COURT

OF THE UNITED STATES

OCTOBER TERM, 1985

FRANK BLACKBURN, WARDEN Louisiana State Penitentiary, Petitioner, VERSUS JAMES FLOWERS, Respondent	)	NO. 85-1476

RESPONDENT'S BRIEF IN OPPOSITION TO PETITIONER'S PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

STATEMENT OF THE CASE[1]

(i) Procedural History

James Flowers was convicted by a jury of first degree murder and a sentence of death was recommended on February 5, 1982 in the 14th Judicial District Court in the Parish of Jefferson, State of Louisiana. The petitioner's conviction and sentence were affirmed on appeal, State v. Flowers, 441 So. 2d 707, La. 1983.

A petition for Post Conviction Relief, Writ of Habeas Corpus, Evidentiary Hearing, and Stay of Execution were filed on June 19, 1984. On June 21, 1984, the Stay Order was issued by the Honorable Lionel Collins, Division L, 24th Judicial District Court, ordering an evidentiary hearing limited to the issues of the constitutionality of the jury instructions and the effective assistance of counsel.

On November 5, 1984, Judge Collins issued a judgment denying the Writ of Habeas Corpus and setting aside the stay of execution stating that there was effective assistance of counsel. Relief was subsequently denied the respondent,

James Flowers, in the Louisiana Supreme Court. State ex rel Flowers vs. Maggio, 466 So. 2d 1293 (La. 1985).

Petitioner filed a Petition for Federal Habeas Corpus which was ultimately denied on May 1, 1985 by the United States District Court which had twice before denied relief but the case had been remanded by the Fifth Circuit for more complete review by the Federal Court.

The United States Court of Appeals granted petitioner's Certificate of Probable Cause on June 18, 1985. Flowers vs. Blackburn, 764 F.2d 276 (CA5, 1985).

On January 8, 1986, an opinion was rendered by a three Judge panel of the United States Court of Appeals for the Fifth Circuit reversing the denial of habeas relief by the United States District Court and ordering a new trial for James Flowers. Flowers vs. Blackburn, _____F.2d _____, (CA5, 1986). The decision was based on a finding by the Fifth Circuit that the jury instructions impermissibly relieved the State of their burden of proving that James Flowers had the intent to kill and amounted to unconstitutional burden-shifting.

(ii) Statement of Facts

James Flowers was arrested in October of 1981 and charged with first degree murder in Jefferson Parish, Louisiana. He was appointed counsel because of his indigency. In February of 1982, trial commenced. At the close of the trial and at the close of the sentencing hearing, the court instructed the jury that they could find Mr. Flowers guilty and further that they could sentence him to death even if he was only an aider and abettor to the crime. The instructions are clearly erroneous under Louisiana Law which specifically states that:

> "Not all principals are automatically guilty of the same grade of offense. One who aids and abets in the commission of a crime may be charged and convicted with a higher or lower degree of the crime depending upon the mental element proved at trial....Thus, an individual may only be convicted as a principal for those crimes for which he has the requisite mental state. In the case of a first degree murder conviction, the requisite mental state is that the defendant had the specific intent to kill. It is not enough to find merely that his co-conspirator or accomplice had the necessary mental state, since this intent cannot be inferred to the accused. It must also be shown that this accused had the specific intent to kill." LA. R.S. 14:24.

In the instant case,there was a co-defendant, one Olin Grant, who plead guilty to manslaughter and received a sentence of twenty-one years prior to this trial. The evidence presented implicated Mr. Grant to the same degree that it implicated Mr. Flowers. The case was wholly circumstantial and the effect of the Court's instruction was to allow the jury to find Mr. Flowers guilty and sentence him to death based upon their belief that either Mr. Flowers or Mr. Grant committed the crime.

REASON WHY THE PETITION FOR WRIT OF CERTIORARI SHOULD NOT BE GRANTED

I.

> THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT PROPERLY DETERMINED THAT THE JURY INSTRUCTIONS GIVEN BY THE TRIAL COURT AT THE GUILT/INNOCENCE PHASE OF RESPONDENT'S TRIAL WERE UNCONSTITUTIONALLY BURDEN-SHIFTING AND THEREFORE A VIOLATION OF THIS COURT'S DECISION IN SANDSTROM VS. MONTANA, 442 U.S. 510, (1979).

The State presents two questions to this Court in its Petition for Writ of Certiorari. Both involve whether the death penalty could be invoked under Enmund vs. Florida, 458 U.S. 782 (1982) and Cabana vs. Bullock, _____U.S._____, (No. 84-1236 decided on January 22, 1986). The Fifth Circuit

decision had nothing to do with either of these cases and had nothing to do with the death penalty being imposed in this particular case. The Fifth Circuit in its decision in this case, held that the jury instructions given by the trial court at the guilt/innocence phase of respondent's trial were unconstitutionally burden-shifting and therefore in violation of this Court's decision in Sandstrom vs. Montana, 442 U.S. 510, (1979). That is the only issue addressed by the Fifth Circuit in this case. The State continues to misunderstand the issue in this case, that James Flowers could have been convicted as an aider and abettor even though he did not kill or intend to kill under the erroneous instructions given by the Court.

CONCLUSION

Respondent, James Flowers, for the reason stated above prays that the Warden's Petition for Writ of Certiorari be denied.

Respectfully submitted,

MICHELE GAUDIN
614 Tchoupitoulas Street
New Orleans, La. 70130
(504) 524-7727

COUNSEL FOR JAMES FLOWERS

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing instrument was served upon the attorneys of record of all parties to the above cause by enclosing the same in an envelope addressed to such attorneys at their business address as disclosed by the pleadings of record herein, with postage fully prepaid and by depositing said envelope in a U. S. Post Office mail box,
on the 27 day of August 1986.